SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-93

WALTER J. HOWARD, LEANDRUS JORDEN, ARTHUR L. DAVIS, WILLIE E. JORDAN, GORDON ROGERS, MOSES MEEKS, JAMES L. SIMS AND H. A. CRUMP, INDIVIDUALLY AND AS MEMBERS OF A CLASS,

Petitioners,

versus

FLORIDA EAST COAST RAILWAY CO., INC. AND NEHEMIAH MUNGIN, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR FLORIDA EAST COAST RAILWAY COMPANY IN OPPOSITION

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OPINIONS BELOW; JURISDICTION

The relevant opinions and judgments of the Court of Appeals and the District Court rendered in this case have been printed as Appendices A, B, C and D to the Petition herein (Pet. App. A1-A35, B1-B3, C1-C18,

D1-D3).[1] The proper basis of jurisdiction has been stated.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether certiorari should be granted to review a *per curiam* affirmance by the Court of Appeals of a District Court judgment approving the compromise and settlement of a class action and an opinion containing detailed findings of facts and conclusions of law denying relief from judgment where:

(1) The District Judge, who was "in the locomotive cab" giving "careful superintendence to his railroad duties" and was fully informed and aware of all relevant facts and circumstances, held the suit was properly a class action and approved the compromise and settlement as "fair, adequate and reasonable" after due and complete notice to all class members and hearing thereon; and

(2) No class member opposed the overall settlement and compromise and only three of over 200 class members stated any type of opposition thereto, that opposition being limited solely to a desire for a larger individual share; and

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[1]References to the appendix to the petition will follow the pagination therein and will be made as "Pet. App."

References to the petition for writ of certiorari are made as "Pet."

References to the appendix in the Court of Appeals are made as "R".

(3) All but two class members have accepted cash benefits as part of payments totalling $300,000 of the settlement sums, pursuant to the settlement terms, and even these two are holding their checks, and no one has offered to restore the $300,000 paid out to the class.

STATEMENT OF CASE

This case involves a settlement and compromise of a class action maintained on behalf of the locomotive firemen of the Florida East Coast Railway Company (hereinafter FEC). The settlement included money damages of $800,000, which actually will amount to nearly $900,000 by investment during the two-year payout period.[2] Promotional opportunities for firemen to other operating crafts, concomitant with abolition of firemen jobs, was provided. *The consideration given in settlement has in no way been challenged here and the overall propriety of the settlement sum and contract is not attacked.* Petitioners only attack the means used to accomplish this unassailed end and seek a bigger division of the spoils. (See Pet. 11).

Understanding the significance and validity of the settlement requires at least preliminary reference to two important factual backgrounds — the status of firemen in the railroad industry and the extended strikes and related litigation involving FEC and its employees. Both of these are further detailed in the argument below. It is common knowledge, especially to the federal

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[2]Further payouts contemplated by the settlement have been stayed below pending first the appeal and now this petition.

judiciary, that there has been a protracted dispute concerning the necessity for and use of firemen on diesel locomotives, festering for nearly fifty years. This controversy has centered around whether firemen are necessary at all on any trains, with the carriers claiming technological advances have rendered them obsolete and the unions replying they are still needed, both to operate the trains and to satisfy safety requirements. Literally millions, perhaps billions, of man hours have been expended by Presidents, judges, Congressional members and staffs, Labor Department personnel, special mediators and board members, arbitrators, attorneys, carriers and unions seeking a solution. Here one was found if only for one railroad and its employees. This railroad was further unique in that it and its employees were and are involved in the longest strike in the nation's railroad history, reference to which has already been made by Petitioners, see Pet. 4, and by the Court of Appeals, see Pet. App. C1-C2, fn. 1. As a consequence of that strike and related developments, most of the persons holding fireman seniority had not worked for FEC for seven years or had worked only during part of that time. The strike context raised a myriad of problems concerning the rights of the firemen to back pay such as offers of reinstatement, offers to return to work, refusals to cross picket lines, interim earnings, reasonable attempts to find interim employment, receipt of railroad unemployment compensation benefits, etc.

Against this background this case was originally filed in 1967 and the Court of Appeals finally held in 1969 that the complaint stated a cause of action on behalf of the entire craft over which the District Court

had jurisdiction, see Pet. App. C1, ff. At that juncture, FEC prepared to seek a writ of certiorari from this Court and a petition was actually prepared, but was never filed, although extensions of time to do so were granted by this Court, because in the interim the settlement had been reached. That petition would have involved a substantial undecided question — the power of a federal court to grant back pay as an equitable sanction for violations of the "major" dispute "status quo" provisions of the Railway Labor Act, 45 U.S.C. §§ 152, Seventh, 156. The Court of Appeals decision that such power existed might have been reversed. No trial had been had and the firemen yet had to prove the allegations of their complaints and to establish their individual entitlements to back pay in any amount.

In this context, settlement negotiations were conducted in late December, 1969, FEC stating that if these were not brought to fruition before the year's end so certain tax benefits could be realized, it would not settle but would pursue its petition for certiorari and its defense of the case. In light of the Court of Appeals holding that the suit presented "a claim on behalf of the entire craft (of firemen) whether represented or not" and that it was being remanded for "the granting of whatever relief is appropriate" (Pet. App. C18), which could encompass "reinstatement and reconstruction, so far as practicable, of the status quo" (Pet. App. C17) including perhaps "reinstatement, back pay, injunctions and the like" (Pet. App. C12), the necessity of resort to a class action under Rule 23 of the Federal Rules of Civil Procedure was plain to all counsel.

Appropriate steps were, therefore, taken to realize the settlement and to present it for preliminary approval to the District Judge so that payment by FEC could be made prior to the end of the year. At a hearing on December 30, 1969, the various motions and pleadings concerning the conversion to a class action and IARE intervention, as well as the settlement proposals, were presented to the District Judge. The proposed compromise was explained fully, including the formula of distribution, the determination of individual shares, and the collective bargaining agreement. Judicial approval of the collective bargaining agreement, the propriety of which is questioned apparently by Petitioners (Pet. 15), was secured because the injunction in *U.S. v. F.E.C. Ry. Co.*, No. 64-107-Civ-J (M.D. Fla), upon which the Court of Appeals placed so much emphasis in finding a cause of action had been stated (Pet. App. C4-C8, C11), had been construed apparently by the same District Judge as requiring an order by the Court before FEC could implement changes in working conditions either after exhaustion of the processes of the Railway Labor Act or after successful collective bargaining. *Id.*, Order of September 23, 1968, finding FEC in civil contempt for placing changes into effect after exhaustion of Act's processes but without prior approval of the Court. The settlement in every detail was conditioned upon *final* approval of the Court after notice to the class and a hearing on final propriety. The December proceedings and orders were solely *preliminary*. The District Judge, whose discretion in class action settlements is invoked, was fully aware of this significant situation, so he pointed out in his later opinion (Pet. App. A4-A5, para. 10-12, A21-A22, para. 7).

Thereafter, numerous meetings, exchanges of correspondence and telephone conversations were had between the members of the class, including Petitioners, and their counsel, Milledge & Horn (Pet. App. A7, para 16; Affidavit of Allen Milledge, Esq., R184-186): The notices to all class members in the form ordered by the Court (Pet. App. E1-E3) were mailed on February 5 and 6, 1970 (R. 76), some 32 days before the March 11 hearing on whether final approval of the compromise should be entered. The notice told the class members of the class action motions and order, the grant of intervention, the proposed settlement and collective bargaining agreement, the preliminary approval, the location of all documents, and the time and place to be heard on final advisability of the settlement. Full explanation of the details of settlement were given the class members in the several meetings with their counsel in January, 1970 (R. 184), and March, 1970 (R. 185-186). The Petitioners complain that full copies of all the documents were not mailed to the class members, who it is alleged did not live in Jacksonville and, it is thus inferred, were faced with an undue burden of traveling there to examine those documents at the Clerk's Office (Pet. 18-19). However, the affidavits of Petitioners submitted to the District Court in support of their Motion for Relief from Judgment show that the Petitioners lived in New Smyrna Beach, Florida (Howard - R. 141; Jorden - R. 156; Davis - R. 144; Rogers - R. 168; Meeks - R. 162; Sims - R. 176; Crump - R. 147). New Smyrna Beach is only about 115 miles south of Jacksonville and they are connected by a high-speed interstate highway, I-95. Thus, Petitioners could not apparently bring themselves to suffer the incon-

venience of a four-hour round trip automobile ride to find out anything they wanted to know.

At the hearing on March 11, apparently the Petitioners had decided the automobile ride was not too far for they were present (Howard - R. 143; Jorden - R. 157; Davis - R. 146; Rogers - R. 172; Meeks - R. 244; Crump - R. 151). Only Howard, Jorden and Crump testified. The others were silent. The testimony of these three was only concerned with their desire to get a bigger individual share and each stated he did not wish to be understood as opposing overall settlement. After this hearing the District Court then finally approved the settlement. Thereafter followed the unsuccessful attacks on the judgment in the District Court, the unsuccessful appeal and now this petition. Also, the first payout of settlement proceeds was made in the amount of $300,000. Every class member but two cashed his check and kept the proceeds. Petitioners Howard and Meeks did not cash their checks, which totalled about $6,100.00 less attorney's fees, so nearly $295,000 worth of payout has been accepted and used by the recipients. Howard and Meeks have kept their checks.

ARGUMENT

This case simply does not present any occasion for the exercise of the certiorari powers of this Court. No conflict of appellate decisions is presented. No substantial federal question is presented. The judgment and decisions of the District Court and the Court of Appeals were eminently correct and fully considered and rejected Petitioner's attacks upon the settlement itself

and the settlement procedures. Although a strained attempt is made apparently to invoke the supervisory powers of this Court; the record amply demonstrates that there is no necessity for the exercise of those powers and no reason why this case would be appropriate for such exercise.

The Court of Appeals, following full presentation by Petitioners of their arguments, affirmed the District Court *per curiam* and without decision under its Rule 21.[3] The Court of Appeals does not invoke Rule 21 lightly, recognizing its use involves a "heavy obligation" in view of its opinion-writing function important both to the parties before it seeking resolution of their case and innumerable others seeking guidance in the future. It is "vigilant" to the sensitivity necessary to its role and indeed a unanimous decision of appropriateness is required before Rule 21 is used in any case, a decision-making process designed to insure Rule 21 will be carefully and selectively employed. See *N.L.R.B. v. Amalgamated Clothing Workers, etc.*, 430 F.2d 966, at 971-973 (5 Cir. 1970). Thus, the use of Rule 21 in

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[3]Rule 21 provides:

> When the Court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the Court for decision: (1) that a judgment of the District Court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the Court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.
>
> In such case, the Court may in its discretion enter either of the following orders: "AFFIRMED. See Local Rule 21" or "ENFORCED. See Local Rule 21."

this case reflects an informed and mature judgment that the District Judge's "findings of facts ... are not clearly erroneous", that there was no "error of law", and that the case is such that "an opinion would have no precedential value." This scarcely is the type of case that should clog the docket of this Court.

The settlement itself, explicitly found "fair, adequate and reasonable" by the District Judge, and which the Court of Appeals also approved implicitly, is not apparently attacked here except by innuendo and inference. It hardly could be attacked considering all the circumstances of this case, including the background of the dispute over the use of firemen and the long strike on FEC, both of which were fully known to the District Judge, and which are set out in some detail now for the benefit of this Court.

First, the use of firemen on diesel locomotives is itself one of the most hotly-contested questions in railroad industrial relations, occupying not only exorbitant amounts of time of railroads, their employees, and the employees' unions in seeking a settlement, but also spilling over into this Court, (see *Brotherhood of Locomotive Engineers v. Baltimore & Ohio R.R.*, 372 U.S. 284 (1963), *Brotherhood of Locomotive Engineers v. Chicago, Rock Island & Pacific R. Co.*, 382 U.S. 423 (1966)), Courts of Appeal and District Courts (see *Brotherhood of Railroad Trainmen v. Akron & Barberton Belt R. Co.*, 385 F.2d 581 (D.C. Cir. 1967), cert. den. 390 U.S. 923 (1968), *Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 380 F.2d 605 (D.C. Cir. 1967), cert. den. 389 U.S. 928

(1967), *Brotherhood of Locomotive Firemen & Enginemen v. Central of Georgia Ry. Co.*, 411 F.2d 329 (5 Cir. 1969), *Brotherhood of Locomotive Firemen & Enginemen v. Atchison, Topeka & Santa Fe Ry. Co.*, 442 F.2d 794 (D.C. Cir. 1971)), the National Mediation Board (see *Brotherhood of Locomotive Firemen & Enginemen v. National Mediation Board*, 410 F.2d 1025 (D.C. Cir. 1969), cert. den. 396 U.S. 878 (1969)), Congress (see Public Law 88-108, 77 Stat. 132), and several Presidents (see *Brotherhood of Railroad Trainmen v. Akron & Barberton Belt R. Co.*, *supra*, at 589-590 *Report to the President by Emergency Board No. 177*, August 6, 1970, see especially Appendix B).

This "ancient issue",[4] involving "twin problems of automation and technological unemployment",[5] was and is indeed a "sensitive and touchy problem."[6] Even though "due to gradual technological changes the traditional functions of the Fireman had become largely obsolete",[7] leading the most recent Presidential Emergency Board to voice a melancholy echo of the unanimous findings of neutral members of prior Boards that "there is no need for firemen on freight and yard diesel locomotives except under rare operating conditions",[8] this "futile",[9] "irrepressible"[10] controversy has drag-

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4380 F.2d at 607, per Judge Burger.
5382 U.S. at 438, per Justice Douglas.
6382 U.S. at 430, per Justice Black.
7410 F.2d at 1035, per Judge Burger.
8Report of Emergency Board No. 177 at p. 4.
9410 F.2d at 1035, per Judge Burger.
10411 F.2d at 322, per Judge Brown.

ged on, generating an "unhappy history of wasteful strife."[11]

By contract, in the present case, the longed-for "responsible accord"[12] has been reached, involving a recognition of technological reality[13] and providing a means to fulfill the firemen's "quest to become engineers."[14] Rather than snidely characterizing this as a "quickie collective bargaining agreement"[15] and implying that it was somehow a failure of faithful representation, it would seem more appropriate to recognize the "high order of union statesmanship"[16] on IARE's part in helping secure for the firemen it represented payment for the past and hope for the future. The collective bargaining agreement here resolved the status of locomotive firemen on FEC by ratifying previous promotions of many firemen to engineer and hostler positions, and by offering opportunities for promotions of other firemen to any operating position — brakeman, yardman, hostler, engineer or conductor. Under the working agreement covering operating positions these promoted firemen could carry forward their total accrued seniority into the other crafts, thus protecting

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11 410 F.2d at 1035, per Judge Burger.

12 385 F.2d at 589, per Judge Leventhal.

13 See the agreement itself at R. 46. FEC has no passenger service. FEC uses diesel locomotives which are operated solely in freight and yard service.

14 410 F.2d at 1035, per Judge Burger.

15 Pet. 19.

16 410 F.2d at 1035, per Judge Burger.
It was especially appropriate here where an earlier agreement involving the physical condition dispute had already been held void. *Harrison v. FEC Ry. Co.*, No. 65-366-Civ-J (M.D. Fla. 1967). Many firemen had not worked for seven years, many

them against layoffs, giving them a fair chance for work opportunities, and overcoming any past years of racial discrimination. IARE had sought such a promotion rule in the past (R. 280, para. 2). A provision for resolution of disputes over the physical condition of firemen by use of a neutral doctor was included.[17]

On the other hand, there had been "a decade of industrial strife as the Nation's longest railroad strike", all of which had spilled over into the District Court, the Court of Appeals and this Court. See Pet. App. C1-C2, fn. 1. The District Judge here involved, Judge Scott, had been in the "locomotive cab" since 1967 and had "given such careful superintendence to his railroad duties" (Pet. App. C2, C9) and was fully aware of the *Harrison v. FEC Ry. Co.* case, which he had decided, plus the ongoing developments in *U.S. v. F.E.C. Ry. Co.* over which he was presiding in the aftermath of earlier opinions of this Court and the Court of Appeals upholding preliminary injunctive relief. He was also aware of other pending litigation involving FEC and its operating employees all of which were assigned to him.

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were of advanced age, and there were many serious questions involving whether individual firemen were physically fit to perform the duties of the positions to which they might be promoted. For instance, Petitioner Howard was allegedly too deaf to do so, as well as having a spinal defect; Petitioner Jorden had previously sued FEC for on-the-job injuries and testimony had been presented on his behalf that he was permanently disabled; Petitioner Davis suffered from a heart murmur and high blood pressure; and Petitioner Meeks had diabetes and osteoarthritis of both knees.

[17]The use of neutral doctors to resolve such disputes has been specifically approved by this Court in another context. *Gunther v. San Diego & Arizona Eastern Ry. Co.*, 382 U.S. 257 (1965).

Judge Scott was in a uniquely qualified position to exercise a fully informed discretion on the appropriateness of this settlement. It is his discretion, his decisions, his judgments, and his opinions that are under attack here, yet he had a range of knowledge and information shaping that discretion which perhaps exceeded that of the litigants themselves. The petitioner's attorneys admitted below that he had made a correct decision on the record before him, see R. 218. The petitioners attempt to divert the attention of this Court away from its proper focus upon the actions of the District Judge and focus it instead on alleged acts of misconduct on the part of the attorneys for the firemen. Indeed it is somewhat amazing that these counsel, who have so vigorously pursued and are pursuing the interests of not only the firemen, but members of many other operating and non-operating crafts employed by FEC should be so grossly attacked.[18] Yet Petitioners would have this Court believe that while counsel robbed the passengers, the District Judge "high-balled" the train beyond the reach of justice.

The acts of Judge and counsel in the proceedings below were entirely proper and in no way prejudicial to Petitioners or the class. The representation of IARE was in no way a conflict of interest, although Peti-

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[18]Mr. Milledge was of counsel in not only the present case but had also successfully attacked the physical disability settlement in the *Harrison* case. He further represented and still represents the non-operating crafts in the *U.S. v. F.E.C. Ry. Co.* case which has been to both this Court and the Court of Appeals. He represented the operating crafts in the District Court, the Court of Appeals and here in this Court in several cases.

tioners heatedly assert it was and rely heavily upon these assertions. At no time did IARE take any position that in any way conflicted with the apparent desires of the overwhelming majority of its members. Although it may not have pleased them all, it is scarcely likely that it could do so in a situation such as here involved. IARE had never breached its duty of fair representation, although once it had exceeded its authority, but only in a good-faith attempt to resolve a number of festering disputes. At no time did IARE assert any claims on behalf of itself or seek a share of the settlement for itself. Indeed, it bargained itself out of a job for the benefit of its members. It is therefore scarcely surprising that the District Judge found that assertions regarding the role of IARE or its representation by Milledge & Horn to be groundless and of no legal consequence (Pet. App. A17-A19, para. 4). This Court likewise should not be distracted by this smoke-screen.

The propriety of the class action motions and determination, plus the reasons therefor, have also been extensively discussed by the District Court and need not be repeated here (see Pet. App. A15-A17, para. 3). It is clearly correct and furnishes no reason for this Court to act. The filing by Milledge & Horn of amendments to state a class action and of a motion to maintain the suit as a class action were procedural steps taken by them to enforce their clients' rights and based on their professional judgment that such steps were necessary and proper in furtherance of the interests of their clients. Again these acts were clearly within their authority as counsel of record and fur-

nish no reason for the supervisory powers of this Court to be exercised.

The exclusively preliminary nature of the order of December 30, 1969, has already been extensively discussed. With the Court and parties so painfully aware of its indispositive nature, and so careful to frame the documents against finality, it is difficult to take seriously the assertions of Petitioners that their rights to protest and oppose the settlement were somehow so effectively vitiated that this Court must step in where other courts below have seen no need to tread.

Rather the proceedings below fully comport with the requirements and intent of Rule 23. On full and adequate notice a hearing was held where all class members could express their views. That some remained silent for unexplained reasons, even though allegedly they opposed the settlement, is not a reason for granting certiorari but rather an estoppel which may even be viewed as destroying any right to appeal or seek certiorari, especially when coupled with the receipt and retention of the benefits of the settlement. Even those who protested sought only a greater individual share and each, after careful explanation by the District Judge, stated that he did not wish to be understood as opposing the settlement as a whole. See R103, 104 re Crump, R114-115 re Howard, R124, 128 re Jorden. Crump and Howard repeated their positions through counsel after conferring with counsel during a recess. R120-121. Thus any assertions now made by Petitioners that all of any of them really opposed the settlement is clearly wrong.

Regardless of the extended protects now made by Petitioners, these protests all come far too late. They are the after-thoughts of dissatisfied men who failed to take any action on their own behalf when they had the opportunity to do so. Before final approval, Petitioners heard, saw, and spoke no evil, although they now claim they were fully aware of it. They cannot now escape the consequences of their own deliberate failure to act. They cannot now bootstrap themselves into a successful attack on the judgments below on the grounds of prejudice caused by themselves. This Court clearly must deny their petition.

One final, important consideration must be advanced. As found by the Court below, and unchallenged here, almost the entire class has accepted and retained the benefits of the settlement. Even the two who did not do so are still holding their checks. No one has offered to restore the $300,000 paid out. This fact, combined with the actual and constructive knowledge of the settlement terms, the complete failure of almost all class members to oppose the settlement, and the very limited and indirect opposition of three firemen brings this case within the unanimously expressed rules of ratification and estoppel. To the long list of authorities cited by the District Court, see Pet. App. A28, A29, A30, A32 should be added also the following: *Cox v. Esso Shipping Co.*, 247 F.2d 629, at 637-638 (5 Cir. 1957); *Kaiser v. Standard Oil Co. of New Jersey*, 89 F.2d 58 (5 Cir. 1937); *Livesay Industries, Inc. v. Livesay Window Co.*, 202 F.2d 378, at 382 (5 Cir. 1953), cert. denied 346 U.S. 855 (1953); *Colquette v. Crosett Lumber Co.*, 149 F.2d 116 (8 Cir. 1945); *American Na-*

tional Bank & Trust Co. of Chicago v. Taussig, 255 F.2d 765, at 769 (7 Cir. 1958); *Burgess v. Nail*, 103 F.2d 37 (10 Cir. 1939); *In re Denny*, 135 F.2d 184 (7 Cir. 1943), cert. den. 320 U.S. 747 (1943), reh. den. 320 U.S. 812 (1943); *Spanel v. Berkman*, 171 F.2d 513, at 515, 517, (7 Cir. 1949), cert. den. 336 U.S. 968 (1949); *Wilson v. Pantasote Co.*, 254 F.2d 700 (7 Cir. 1958); *Wilson v. Union Electric Light & Power Co.*, 59 F.2d 580 (8 Cir. 1932); *In re Greypoint Metallic Bed. Co.*, 113 F.2d 881 (2 Cir. 1940). These unanimous authorities are clearly applicable here. Petitioners have advanced no substantial reason why they should be exempt from the operation of these well established principles. These circumstances render this case clearly an inappropriate one for the exercise of discretionary supervision by this Court.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition shall be denied.

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CERTIFICATE

I, Erle Phillips, Attorney for Respondent, Florida East Coast Railway Company, and a member of the bar of the United States Supreme Court, do hereby certify that three copies of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari have been served upon opposing counsel by placing same in the United States mail, addressed to them at their offices with sufficient postage thereon annexed:

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